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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC., a California corporation; GARY HAMILTON, an individual; SUSAN HAMILTON, an individual,
Petitioners,

vs.

BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO., L.P., a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court exercise its discretionary jurisdiction to determine whether the Ninth Circuit erred in holding that federal antitrust liability may not be premised upon either (1) a California Water District's taking actions expressly authorized by California law, or (2) private parties' allegedly conspiring to influence those actions?

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BRIEF IN OPPOSITION

The Paramount respondents[1] respectfully pray that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

[1] In the courts below, Petitioners named Paramount Farming Co., L.P., Paramount Orchards Holdings, Inc., Paramount Farming Enterprises, Inc., and Paramount Farms, Inc. (collectively, "Paramount"). However, Petitioners appear to be pursuing their case in this Court

SUMMARY

Petitioners wholly fail to show that this case presents any "special and important reasons" that would justify the Court's granting their petition for a writ of certiorari. Sup. Ct. R. 10. To the contrary, this case presents a textbook example of conduct that is protected from federal antitrust liability under the well-developed *Noerr-Pennington* and state action immunity doctrines. Both the District Court and the Ninth Circuit so held. Petitioners do not claim that these decisions — unpublished in any event — conflict with decisions in other Circuits. Nor do Petitioners claim that this case concerns an undecided legal issue of broad or exceptional significance. Instead, petitioners simply argue that the Ninth Circuit erred in applying the clear law to the particular facts at issue. Even were this argument correct (and we demonstrate below that it is not), it would not warrant the Court's granting the writ.

STATEMENT

Petitioners own land within the Berrenda Mesa Water District ("BMWD") in Kern County, California. They are unhappy with various BMWD decisions, expressly authorized by California law — imposing standby charges and *ad valorem* taxes, foreclosing or threatening to foreclose on lands where assessments are delinquent, and rejecting proposed sales of district water. Rather than challenge these official decisions in state administrative or judicial proceedings, petitioners brought this federal antitrust case. They named as defendants the BMWD, Paramount, and Blackwell Land Company, Inc.

Under the legislatively-mandated scheme for electing the BMWD's board, landowners vote in proportion to the as-

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against only Paramount Farming Co., L.P. and Paramount Orchards Holdings, Inc.

sessed value of their land within the District. Cal. Water Code § 35003. Board members must be either landowners, in the case of individuals, or representatives of landowners, in the case of corporations. *Id.*, § 34700. In *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), this Court found that these election procedures are constitutional.

In their complaint,[2] Petitioners allege that Paramount and Blackwell are the two largest landowners in the BMWD, and that two of the five BMWD board members are Paramount representatives while two others are Blackwell representatives. Petitioners allege antitrust liability with respect to Paramount and Blackwell on the ground that these defendants purportedly held "closed meetings" and entered into "secret agreements" to influence certain BMWD decisions for their own selfish interests. Petitioners also allege that these defendants, through their voting power, controlled BMWD board elections and, therefore, certain actions of the BMWD that affected Petitioners.

Based upon an unambiguous line of decisions by this Court and the Courts of Appeals, both the District Court and the Ninth Circuit issued unpublished dispositions holding that the defendants' alleged conduct was immune from antitrust liability. As the Ninth Circuit concluded,

> Plaintiffs' allegations do make out a case that the defendant landowners [Paramount and Blackwell] acted in their own self interest in bringing about water district decisions favorable to them and detrimental to the plaintiffs. However, it is beyond the scope of the antitrust laws "to identify and invalidate lobbying that

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[2]Petitioners' complaint is reproduced as Exhibit A to the BMWD's Brief in Opposition.

has produced selfishly motivated agreement with public officials."

P.C.B. 7 (*quoting City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 383 (1991)).

ARGUMENT

I.

No Important Or Special Reasons Justify The Court's Exercising Its Discretionary Jurisdiction To Review This Case.

The courts below issued unpublished dispositions analyzing the facts of this case under the *Noerr-Pennington* and state action antitrust immunity doctrines. It is undisputed that there are no pertinent ambiguities or gaps in this Court's opinions on these subjects. It is undisputed that there is no Circuit conflict. Petitioners' sole contention is that the Ninth Circuit erred in applying these doctrines to the specific facts alleged in their complaint. Even were Petitioners correct, this would not justify the Court's exercising its discretionary jurisdiction to review this case. The writ should be denied on this ground alone.

II.

The Ninth Circuit Correctly Determined That The *Noerr-Pennington* Doctrine Immunizes Paramount From Liability For Its Alleged Attempts To Influence The BMWD's Actions.

The Ninth Circuit correctly determined that Paramount is immune from scrutiny for its alleged attempts to influence the BMWD's actions. Under well-established precedents, private parties are shielded from antitrust liability for efforts to influence government action, regardless of whether those efforts are allegedly intended to eliminate or restrain compe-

tition and regardless of whether those efforts are alleged to involve collusion between the private parties and governmental actors. *E.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-84 (1991).

Petitioners now argue the so-called "sham" exception to *Noerr-Pennington* immunity. "The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *City of Columbia*, 499 U.S. at 380 (*citing California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)).

Petitioners did not allege the sham exception in their complaint, and did not argue it below. They may not raise it for the first time here. *E.g., Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992).

Moreover, despite Petitioners' omission, the District Court did address the issue in its comprehensive opinion, correctly holding that the sham exception is inapplicable. As the District Court noted, Petitioners themselves alleged that Paramount's and Blackwell's attempts to influence the BMWD — far from being a sham — were actually successful:

> Blackwell and Paramount's *Noerr-Pennington* immunity does not fail under the sham exception because the defendants' alleged activities were actually directed at the governmental entity, to achieve a desired result from the governmental entity. Blackwell and Para-

> mount claim they sought to prevent the sale of District water to assure the District an adequate water supply through future droughts. The Board's refusal to approve water sales suggests that Blackwell and Paramount's efforts were successful. *City of Columbia* extends Blackwell and Paramount *Noerr-Pennington* immunity even if their ultimate goal is to weaken plaintiffs' business, so long as they sought to achieve this goal through governmental action.

P.C.A. 31-32. Petitioners cannot evade the limitations of the sham exception simply by characterizing Paramount and Blackwell as having "sought to bar their competitors from meaningful access to District decisions." Pet. Cert. 13-14. As this Court has held, such alleged conduct is similarly immune from antitrust scrutiny:

> As for denying meaningful access to the appropriate city administrative and legislative fora, that may render the manner of lobbying improper or even unlawful, but does not necessarily render it a sham. . . . Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored.

City of Columbia, 499 U.S. at 381-382 (citations and internal quotation marks omitted). Likewise, Petitioners' repeated use of the term "government process," Pet. Cert. 7, 13-14, cannot change the fact that Petitioners' underlying complaint is that the BMWD's decisions were wrong and resulted from BMWD board members' conspiring with Paramount and Blackwell to put their interests above Petitioners' interests. This purported harm — which, as the Ninth Circuit recognized, necessarily stems from actual "decisions of the water district not to sell water and to impose standby charges," P.C.B. 6, is fundamentally inconsistent with the sham exception. "If Noerr teaches anything it is that an intent to restrain trade as a *result* of the

government action sought does not foreclose protection." *City of Columbia*, 499 U.S. at 381 (citation and internal quotation marks omitted, emphasis in original).

III.

The State Action Immunity Doctrine Independently Bars Petitioners' Claims Against Paramount.

Because the only acts from which Petitioners' alleged injury arose were the official acts of the BMWD's board, and because there is no "conspiracy" exception to state action immunity, Petitioners' claims against Paramount are also barred in their entirety by that doctrine. This is an independent basis on which the Court should deny the writ.

State action immunity applies to claims arising from official actions regardless of whether an antitrust plaintiff names as the defendant (1) the governmental entity that took the actions, (2) the individuals who actually made the decisions at issue in their official capacity, or (3) these individuals in their private capacity. *Fisichelli v. City Known as Town of Methuen*, 956 F.2d 12, 15-16 (1st Cir. 1992). In *Fisichelli*, the plaintiffs sued a number of members of a town council in their private capacities. The plaintiffs alleged that the council members had entered into a secret agreement to vote against financing bonds to build a mall, in order to prevent the construction of a drugstore that would compete with one owned by a council member. In an opinion authored by then-Chief Judge Breyer, the First Circuit held that state action immunity barred the plaintiffs' claims, stating:

> [A]ppellants point out that the plaintiffs in [*City of*] *Columbia* sued the city itself, while in the present action appellants have sued not only the bond Authority, but also the town manager and town councilors "in their private capacities." The basic conduct of which

> the plaintiffs complain, however, concerns a decision taken by the individual defendants in their roles as town (or municipal Authority) officials. We do not believe that a plaintiff can avoid the ruling of *Columbia* simply by substituting, for the name of the town, the names of the town officials who approved the challenged municipal action.

Id., at 15-16. Likewise here, Petitioners cannot evade state action immunity by suing Paramount, because Petitioners' alleged damages all flow from the official actions of the BMWD — imposing taxes and fees, foreclosing on land, and failing to approve water transfers. Rather, for the same reasons that state action immunity precludes Petitioners' claims against the BMWD, state action immunity also precludes Petitioners' claims against Paramount.[3]

The case in which this Court first enunciated the state action immunity doctrine, *Parker v. Brown*, 317 U.S. 341 (1943), itself involved an analogous situation in which a majority of private raisin producers were required to approve by referendum the California Agricultural Commission's restrictions on the marketing of raisins. *Id.* at 347. This Court dismissed out of hand the suggestion that state action immunity could be defeated where private parties — and self-interested private parties, at that — vote on or otherwise contribute to governmental action. The Court stated:

> Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it

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[3] Analogously, Paramount — like the BMWD — need not show active state supervision to qualify for state action immunity. Moreover and in any event, for the reasons stated in the BMWD's brief, active state supervision exists here.

> with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.

Id., at 352. In other words, where the statutory scheme is such that actions taken by a state board must be approved by direct vote of private persons, the private persons are not subject to antitrust liability in connection with their votes. The case for state action immunity is even stronger in the current case in which the BMWD's actions need be approved only by the vote of elected representatives acting in their official capacity as BMWD board members.

Moreover, *it is state law*, and not the private agreement of Paramount and Blackwell, which mandates that representation on the BMWD's board and, consequently, control over its actions, be determined by landowner-voters in proportion to their holdings. As noted, this Court has expressly found that procedure to be constitutional. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). If antitrust immunity could be defeated wherever one disagreed with a BMWD decision, BMWD board members would be left with the Hobson's choice of either voting against the position of the majority of their constituents or facing potential criminal and treble damages liability by the minority. This is precisely the evil that the state action immunity doctrine is meant to avoid.

Nor does Petitioners' allegation of "closed meetings" and "secret agreements" defeat state action immunity. This Court expressly rejected a "conspiracy" exception to both

state action and *Noerr-Pennington* immunity in *City of Columbia*. 499 U.S. at 374 ("There is no such conspiracy exception."), 383 ("a 'conspiracy' exception to Noerr must be rejected"). The Court explained that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them," *id.*, at 375, and noted that "[t]he California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a 'conspiracy' to put the 'private' interest of the State's raisin growers above the 'public' interest of the State's consumers," *id.*, at 377.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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